

PROPOSED AMENDED RULE 1-200

At its February 21-22, 2003 meeting, the Commission tentatively approved proposed amended rule 1-200. This proposal has not been considered or approved by the Board of Governors of the State Bar of California. Tentative approval means that the proposed amended rule will not be the subject of further amendments until such time as the Chair places the rule on the Commission's agenda for consideration of transmission to the Board of Governors Committee on Regulation, Admissions and Discipline with a request that the Board Committee authorize a public comment distribution of the proposed amended rule. (Note: The issue of a rule numbering system is a topic that the Commission will consider at a future meeting.)

This document provides the following resources: (1) a clean version of proposed amended rule 1-200; (2) a comparison version of proposed amended rule 1-200 (showing changes to current rule 1-200); (3) explanatory notes; and (4) an excerpt from the Commission's February 21-22, 2003 meeting summary.

Proposed Amended Rule 1-200 Clean Version

(As amended in accordance with the action taken at the Commission's 2/21-22/03 meeting.)

Rule 1-200. False Statement Regarding Application for Admission to Practice Law

(A) An applicant for admission to practice law shall not knowingly make a false statement of material fact or knowingly fail to disclose a material fact in connection with that person's own application for admission.

(B) A member shall not knowingly make a false statement of material fact in connection with another person's application for admission to practice law.

(C) As used in this rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; an application for permission to appear *pro hac vice*; and any similar provision relating to admission or certification to practice law.

Discussion:

[1] A person who makes a false statement in connection with that person's own application for admission to practice law may, *inter alia*, be subject to subsequent discipline under this rule if that person is admitted.

[2] The examples in paragraph (C) are illustrative. As used in paragraph (C), "similar provision relating to admission or certification" includes, but is not limited to, an application by an out-of-state attorney for admission to practice law under Business and Professions Code section 6062; proceedings for certification as an Out-of-State Attorney Arbitration Counsel under Rule of Court 983.4, Code of Civil Procedure section 1282.4, and related State Bar Rules; and certification as a Registered Foreign Legal Consultant under Rule of Court 988 and related State Bar Rules.

[3] This rule shall not prevent a member from serving as lawyer for an applicant for admission to practice in proceedings related to such admission. Other laws or rules govern the responsibilities of a lawyer representing an applicant for admission. See, e.g., Bus. & Prof. Code § 6068(c), (d) & (e)); Rule Prof. Conduct 5-200.

Proposed Amended Rule 1-200 Comparison Version

(Underlined text is a proposed addition, strike-through text is a proposed deletion.)

Rule 1-200. False Statement Regarding Application for Admission to the State Bar Practice Law

(A) ~~A member~~ An applicant for admission to practice law shall not knowingly make a false statement ~~regarding a~~of material fact or knowingly fail to disclose a material fact in connection with ~~an~~that ~~person's own~~ application for admission ~~to the State Bar~~.

(B) A member shall not ~~further an~~knowingly make a false statement of material fact in connection with another person's application for admission ~~to the State Bar of a person whom the member knows to be unqualified in respect to character, education, or other relevant attributes~~ practice law.

(C) ~~This rule shall not prevent a member from serving as counsel of record for an applicant for admission to practice in proceedings related to such admission~~ As used in this rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; an application for permission to appear *pro hac vice*; and any similar provision relating to admission or certification to practice law.

Discussion:

~~For purposes of rule 1-120 "admission" includes readmission~~[1] A person who makes a false statement in connection with that person's own application for admission to practice law may, *inter alia*, be subject to subsequent discipline under this rule if that person is admitted.

[2] The examples in paragraph (C) are illustrative. As used in paragraph (C), "similar provision relating to admission or certification" includes, but is not limited to, an application by an out-of-state attorney for admission to practice law under Business and Professions Code section 6062; proceedings for certification as an Out-of-State Attorney Arbitration Counsel under Rule of Court 983.4, Code of Civil Procedure section 1282.4, and related State Bar Rules; and certification as a Registered Foreign Legal Consultant under Rule of Court 988 and related State Bar Rules.

[3] This rule shall not prevent a member from serving as lawyer for an applicant for admission to practice in proceedings related to such admission. Other laws or rules govern the responsibilities of a lawyer representing an applicant for admission. See, e.g., Bus. & Prof. Code § 6068(c), (d) & (e)); Rule Prof. Conduct 5-200.

Explanatory Notes

Title:

The rule title has been modified to reflect the broader scope of the rule. As revised, the scope of the rule addresses admission to the State Bar as well as other types of applications to practice law (i.e., admission *pro hac vice*).

Text:

1. Paragraph (A) has been revised as follows:
 - (i) The phrases “An applicant for admission to the State Bar, or a lawyer applying for admission . . .” has been changed to, “An applicant for admission to practice law . . .” This modification is for brevity, clarity and consistency.
 - (ii) The phrase “to the State Bar” at the end of paragraph (A) has been deleted to be consistent with the broader scope of the rule. The phrase “the terms and” has been added to “conditions” to accurately describe the breadth of a member’s duty to comply under the rule.
2. Paragraph (B) has been revised to be a more specific statement of the conduct that is prohibited by the current language.
3. The concept found in current paragraph (C) (re: rule 1-200 is not intended to prevent a member from representing an applicant) has been moved to the first sentence of the proposed new third paragraph of the Discussion. The concept found in the current Discussion (re: the term “admission” includes readmission) has been moved into proposed new paragraph (C). This new paragraph (C) replaces the term “admission” with a more expansive phrase “admission to practice law.” This change is intended to be consistent with the broader scope of the revised rule.

Discussion:

1. Paragraph [1] of the proposed amended Discussion clarifies the prohibition in paragraph (A) by indicating that when an applicant is admitted, that person then may be subject to discipline for conduct engaged in prior to admission.
2. Paragraph [2] of the proposed amended Discussion clarifies paragraph (C) of the rule by indicating expressly that the examples listed in paragraph (C) are illustrative and not exhaustive. In crafting the language of this Discussion paragraph, the Commission was cognizant of the California Supreme Court’s active study of multi-jurisdictional practice proposals, including proposals for new practice of law certification/registration programs.
3. Paragraph [3] of the proposed amended Discussion is the concept that was moved from current paragraph (C) of the rule. As now incorporated in the Discussion, the word “lawyer” has been substituted for “counsel of record” to account for circumstances where representation of an applicant does not involve “of record” status before a tribunal. In addition, a new sentence offering cross-references to other provisions has been added to alert members to related responsibilities of an advocate.

Comparison to ABA Model Rule of Professional Conduct:

The corresponding ABA Model Rule is Model Rule 8.1 (Bar Admission and Disciplinary Matters) that, in part, provides:

“An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Commentary

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

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[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.”

As previously noted, paragraph (B) of proposed amended rule 1-200 has been revised to be a more specific statement of the conduct that is prohibited by the current rule. In prohibiting a member from knowingly making “a false statement of material fact”, the revised language tracks the standard in Model Rule 8.1(a).

Discussion paragraph [3] of proposed amended rule 1-200 is, in part, based upon the concept found in Comment [3] to Model Rule 8.1.

Concepts Considered but Rejected or Postponed for Future Consideration:

At its February 21-22, 2003 meeting, the Commission considered a possible amendment to rule 1-200 that would be similar to the ABA Ethics 2000 amendments to Comment [1] to Model Rule 8.1 (re: an express statement of a duty to correct a prior misstatement made in connection with another person's application for admission). Following consideration, the Commission determined not to include the amendment, in part, because it posed the possibility of an anomalous situation where an applicant ultimately is admitted and not disciplined for any conduct arising from the application process but a member who failed to correct a prior misstatement in support of the application is nevertheless subject to discipline. In rejecting this proposal for purposes of rule 1-200, the Commission determined to revisit it when the Commission takes up the topic of an attorney's duty of candor.

Excerpt from the Commission's February 21-22, 2003 Meeting Summary

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H. Consideration of Rule 1-200. False Statement Regarding Admission to the State Bar – Further Consideration of Tentatively Approved Rule

The Chair provided an explanation for the reconsideration of this tentatively approved rule. Ms. Foy and Mr. Sapiro summarized a February 7, 2003 memorandum identifying the Chair's suggestion for further amendments. The Chair invited comments on the suggestion that the tentatively approved rule be modified, in the rule text or in the discussion section, to cover the issue of a lawyer's continuing obligation to correct a mis-statement about the qualifications of an applicant while that application is still pending. The Chair noted that the comparable ABA model rule, MR 8.1, covers this issue. Among the points raised during the discussion were the following.

(1) The proposal to limit the obligation to the time period when the application is pending seems to suggest a parallel with a lawyer's general duty of candor to a tribunal and this is a separate, distinct and major topic that should not be addressed in the context of a RPC 1-200 sub-issue.

(2) The proposal also shares qualities with the "snitch rule" that for now has been rejected by a majority of the Commission in connection with RPC 1-120.

(3) The issue might be genuine in the abstract but there may be no incidents of a real world problem. Moreover, the benefits of solving this abstract problem are outweighed by resultant potential for confusion that the modification is likely to cause in the general interpretation of the rule, and potential for trapping unwary attorneys who do not know about the obligation imposed on them in the narrow situation where it applies..

(4) A real world problem is suggested by the In re Lamb scenario.

(5) Consideration of this issue should be tabled as to RPC 1-200 but flagged for consideration when the Commission looks at the duty of candor under RPC 5-200.

(6) The question can be recast as whether a rule change is needed to establish a very specific new basis of discipline to prosecute those character witnesses involved in a pending application or reinstatement process who make statements initially believed to be correct but are then discovered to be false and who are not motivated to correct the misinformation by either: (1) a moral or legal obligation not found in the rules (i.e., if testifying, by penalties for perjury); or (2) the ethical duty of honesty and candor to a tribunal.

Following discussion, the Commission considered whether to adopt the concept of the suggested modification for implementation in the rule text. The Commission determined not to adopt the suggested modification in the rule text by a unanimous vote. The Commission next considered whether to adopt the concept for implementation in the rule discussion section. The Commission determined not to adopt the suggested modification in the rule discussion section by a vote of 3 yes, 7 no and 1 abstention. Although the Commission voted against the suggested modification in connection with this rule, staff was asked to flag the issue for consideration when the Commission takes up RPC 5-200 and the duty of candor.

As the process for consideration of the Chair's suggested modification placed before the Commission the final version of the drafting team's proposed amendments to RPC 1-200 that were previously approved subject to a mail ballot, it was the unanimous consensus of the members present that no mail ballot would be needed. Accordingly, staff was directed to work with Mr. Mohr to prepare the tentatively approved rule for posting on the State Bar website. The text of the tentatively approved proposed amended rule is set forth below.

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General information about the Commission, including: its charter; meeting schedule; and a member-staff roster is available at the State Bar of California website. Go to: www.calbar.ca.gov/ethics and access the link to the "Commission for the Revision of the Rules of Professional Conduct."